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Vivaganth a/l Santharasilan v Public Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2133–11 OF 2016
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
4 JULY 2018

C *Civil Procedure — Striking out — Appeal against order allowing striking out — Plaintiff brought action against defendant for damages for tort of civil malicious prosecution, negligence and abuse of process of court — Learned judge allowed defendant's application to strike out plaintiff's suit on grounds that plaintiff's action did not disclose any reasonable cause of action, scandalous,* D *frivolous or vexatious, and otherwise an abuse of process of court — Whether statement of claim insufficient to entitle plaintiff his claim — Whether learned judge should conduct minute examination of documents and facts to ascertain cause of action — Whether summary process of striking out pleadings suitable — Rules of Court 2012 O 18 r 19*

E

This was an appeal against the decision of the High Court in allowing the defendant's application to strike out the plaintiff's suit pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC') on the grounds that the plaintiff's action did not disclose any reasonable cause of action, was scandalous, frivolous or F vexatious, and was otherwise an abuse of the process of court. The plaintiff together with one Selvaletchumi a/p Sivamoorthy ('Selvaletchumi') (jointly referred to as 'the borrowers') obtained a housing loan of RM96,600 from the defendant bank. Due to the default in the instalment payments, the defendant sued and obtained judgment in default of appearance for RM98,487.81 G against the borrowers. The property which was secured to the loan facility was foreclosed for RM73,900. The plaintiff wrote to the defendant pleading with the defendant not to take any further action as he was in the process of looking for part time work and that he will consider repayment once he got work. The defendant stated that they would withhold legal action against the plaintiff H 'only at judgement stage subject to prompt repayment of RM500 per month with effect from 28 September 2012 ...'. The defendant also stated that they 'shall proceed with the bankruptcy action against another co-borrower Ms Selvaletchumi a/p Sivamoorthy immediately and to proceed with bankruptcy action against you if you failed to comply with the above condition I (1)'. Meanwhile the defendant issued a bankruptcy notice against the plaintiff premised on an indebtedness of RM78,844.70. The defendant wrote to the plaintiff stating inter alia that the defendant would proceed with bankruptcy action if they did not receive the September and October 2012 payment amounting to RM1,000 by 28 October 2012. Meanwhile, the plaintiff

discovered that Selvaletchumi had been making payments to the defendant starting from 28 November 2013–26 December 2014 totalling RM9,000. Between 18 November 2013 and 24 September 2014, the defendant had been communicating separately with both the plaintiff and Selvaletchumi with different proposals for the repayment of the shortfall. On 2 June 2014, the defendant obtained a receiving order and an adjudication order ('ROAO') against the plaintiff. The plaintiff applied to the High Court to annul the ROAO and it was annulled by the Alor Setar High Court. On 3 March 2016, the plaintiff filed the present action against the defendant for damages for: (a) the tort of civil malicious prosecution — for maliciously bringing bankruptcy proceedings against the plaintiff; (b) negligence; and (c) abuse of process of court. The High Court allowed the defendant's application to strike out the plaintiff's suit and hence this appeal.

Held, allowing the appeal with costs and remitting the matter to the High Court for full trial:

(1) This was not a plain and obvious case for the court to exercise its power of striking out the statement of claim. The plaintiff's cause of action was predicated on the tort of maliciously instituting civil proceedings. The court did not think that the statement of claim as it stood was insufficient, even if proved, to entitle the plaintiff to his claim. Whilst the cause of action may not have been appropriately framed in the statement of claim, the court was not satisfied that no reasonable amendment would cure the defect (see para 14).

(2) The court did not think that the learned judge ought to have conducted a minute examination of the documents and facts of the case in arriving at his finding. In a summary process under O 18 r 19 of the ROC, the court should not conduct a minute examination of the documents and facts in order to ascertain whether the plaintiff had a cause of action (see para 15).

(3) The undisputed facts of the instant appeal fell within the special cases of legal process such as the malicious prosecution of a petition in bankruptcy. As such, the summary process of striking out the pleadings was not suitable and the matter should proceed to full trial to be decided on viva voce and documentary evidence (see para 16).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan defendan untuk membatalkan tuntutan plaintif menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa tindakan plaintif tidak mendedahkan apa-apa kausa tindakan yang munasabah, skandal, remeh atau menyusahkan, dan sebaliknya adalah penyalahgunaan proses mahkamah. Plaintif bersama dengan satu Selvaletchumi a/p Sivamoorthy

('Selvaletchumi') (bersama-sama disebut sebagai 'peminjam') memperoleh pinjaman perumahan sebanyak RM96,600 dari defendan bank. Disebabkan kegagalan pembayaran ansuran, defendan menyaman dan memperoleh penghakiman ingkar kehadiran sebanyak RM98,487.81 terhadap peminjam. Hartanah yang telah dicagarkan kepada kemudahan pinjaman telah disita sebanyak RM73,900. Plaintif menulis kepada defendan memohon dengan defendan untuk tidak mengambil tindakan lanjut kerana dia sedang dalam proses mencari pekerjaan separuh masa dan bahawa dia akan mempertimbangkan pembayaran balik setelah dia bekerja. Defendan menyatakan bahawa mereka akan menahan tindakan undang-undang terhadap plaintif 'hanya pada tahap penghakiman tertakluk kepada bayaran balik segera sebanyak RM500 sebulan berkuat kuasa dari 28 September 2012 ...'. Defendan juga menyatakan bahawa mereka 'akan meneruskan tindakan kebankrapan terhadap peminjam yang lain Cik Selvaletchumi a/p Sivamoorthy dengan serta-merta dan meneruskan tindakan kebankrapan terhadap anda jika anda gagal mematuhi syarat (1) di atas'. Sementara itu, defendan mengeluarkan notis kebankrapan terhadap plaintif yang didasarkan pada hutang berjumlah RM78,844.70. Defendan menulis kepada plaintif yang menyatakan antara lain bahawa defendan akan meneruskan tindakan kebankrapan jika mereka tidak menerima pembayaran September dan Oktober 2012 berjumlah RM1,000 pada 28 Oktober 2012. Sementara itu, plaintif mendapati bahawa Selvaletchumi telah membuat pembayaran kepada defendan bermula dari 28 November 2013–26 Disember 2014 berjumlah RM9,000. Antara 18 November 2013 dan 24 September 2014, defendan telah berkomunikasi secara berasingan dengan kedua-dua plaintif dan Selvaletchumi dengan cadangan yang berbeza untuk pembayaran balik kurangan tersebut. Pada 2 Jun 2014, defendan memperoleh perintah penerimaan dan perintah adjudikasi ('ROAO') terhadap plaintif. Plaintif memohon kepada Mahkamah Tinggi untuk membatalkan ROAO dan ia telah dibatalkan oleh Mahkamah Tinggi Alor Setar. Pada 3 Mac 2016, plaintif memfailkan tindakan ini terhadap defendan untuk ganti rugi untuk: (a) tort pendakwaan berniat jahat sivil — untuk berniat jahat membawa prosiding kebankrapan terhadap plaintif, (b) kecuaian; dan (c) penyalahgunaan proses mahkamah. Mahkamah Tinggi membenarkan permohonan defendan untuk membatalkan saman plaintif dan dengan itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos dan meremit semula perkara ke Mahkamah Tinggi untuk perbicaraan penuh:

(1) Ini bukan merupakan kes yang jelas dan nyata bagi mahkamah untuk melaksanakan kuasa untuk membatalkan penyataan tuntutan. Kausa tindakan plaintif didasarkan atas tort berniat jahat memulakan prosiding sivil. Mahkamah tidak berpendapat bahawa penyataan tuntutan seperti yang dinyatakan tidak mencukupi, walaupun dibuktikan, untuk memberi plaintif hak kepada tuntutannya. Walaupun kausa tindakan

mungkin tidak dirangkakan dengan tepat dalam penyataan tuntutan, mahkamah tidak berpuas hati bahawa tiada pindaan yang munasabah yang akan memulihkan kecacatan tersebut (lihat perenggan 14).

(2) Mahkamah tidak berpendapat bahawa hakim yang bijaksana harus melakukan pemeriksaan dokumen dan fakta kes untuk tiba di penemuan tersebut. Dalam proses ringkas di bawah A 18 k 19 KKM, mahkamah tidak boleh menjalankan pemeriksaan dokumen-dokumen dan fakta-fakta untuk memastikan sama ada plaintif mempunyai kausa tindakan (lihat perenggan 15).

(3) Fakta yang tidak dapat dipertikaikan berkenaan rayuan ini berlaku dalam kes-kes khas proses perundangan seperti pendakwaan yang berniat jahat terhadap petisyen dalam kebankrapan. Justeru, proses ringkas untuk membatalkan pliding tersebut adalah tidak sesuai dan perkara tersebut perlu diteruskan ke perbicaraan penuh untuk diputuskan pada *viva voce* dan keterangan dokumentari (lihat perenggan 16).]

Notes

For cases on appeal against order allowing striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9278.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Customs and Excise Commissioners v Barclays Bank plc [2006] 4 All ER 256, HL (refd)

Gregory v Portsmouth City Council [2000] 1 All ER 560, HL (folld)

Jaafar bin Mohd Khalid v Hong Leong Bank Bhd [2013] 5 MLJ 800, CA (refd)

KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation) [2018] 4 MLJ 168; [2018] 3 AMR 285, CA (folld)

Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd [2002] 6 MLJ 507, HC (refd)

Moscow Narodny Bank Ltd v Ngan Ching Wen [2005] 3 MLJ 693, FC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)

Tetuan Bee Ling & Co lwn Vijendran Ponniah [2010] 6 CLJ 643, CA (refd)

Willers v Joyce and another (No 1) [2017] 2 All ER 327; [2016] UKSC 43, SC (refd)

Legislation referred to

Civil Law Act 1956 s 3

Rules of Court 2012 O 18 r 19, O 33 r 2

Appeal from: Civil Suit No WA-22NCVC-127–03 of 2016 (High Court, Kuala Lumpur)

S Surendran (Ranuga, Yogeswari & Surendran) for the appellant.
Barry Goh Meng Yew (Iza Ng Yeoh & Kit) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court in allowing the defendant's application to strike out the plaintiff's suit pursuant to O 18 r 19 of the Rules of Court 2012 on the grounds that the plaintiff's action does not disclose any reasonable cause of action, is scandalous, frivolous or vexatious, and is otherwise an abuse of the process of court. After hearing of submission, we allowed the appeal. We now set out our grounds of decision. In this judgment, the parties shall be referred to as they were in the court below.

THE SALIENT FACTS

[2] The following facts are not really in dispute:

(a) in 2007, the plaintiff together with one Selvaletchumi a/p Sivamoorthy ('Selvaletchumi') (jointly referred to as 'the borrowers') obtained a housing loan of RM96,600 from the defendant bank;

(b) due to the default in the instalment payments, the defendant sued and obtained judgment in default of appearance for RM98,487.81 against the borrowers on 6 July 2009;

(c) on 21 February 2012, the property which was secured to the loan facility was foreclosed for RM73,900;

(d) on 10 September 2012, the plaintiff wrote to the defendant pleading with the defendant not to take any further action as he was in the process of looking for part time work and that he will consider repayment once he gets work;

(e) the defendant replied to the plaintiff on 21 September 2012 stating that they will withhold legal action against the plaintiff 'only at judgment stage subject to prompt repayment of RM500 per month with effect from 28 September 2012 ...'. The defendant also stated that they 'shall proceed with the bankruptcy action against another co-borrower Ms Selvaletchumi a/p Sivamoorthy immediately and to proceed with bankruptcy action against you if you failed to comply with the above condition (1)';

(f) subsequently, there followed an exchange of letters between the plaintiff and the defendant;

(g) meanwhile on 8 October 2012, the defendant issued a bankruptcy notice against the plaintiff premised on an indebtedness of RM78,844.70;

(h) on 22 October 2012, the defendant wrote to the plaintiff stating, inter alia, that the defendant would proceed with bankruptcy action if they did not receive the September and October 2012 payment amounting to RM1,000 by 28 October 2012;

(i) meanwhile, the plaintiff discovered that Selvaletchumi had been making payments to the defendant starting from 28 November 2013–26 December 2014 totalling RM9,000;

(j) between 18 November 2013–24 September 2014, the defendant had been communicating separately with both the plaintiff and Selvaletchumi with different proposals for the repayment of the shortfall;

(k) on 2 June 2014, the defendant obtained an receiving order and an adjudication order ('ROAO') against the plaintiff;

(l) the plaintiff applied to the High Court to annul the ROAO and on 2 June 2014 the ROAO was annulled by the Alor Setar High Court. The defendant did not appeal against the annulment order; and

(m) on 3 March 2016, the plaintiff filed the present action against the defendant for damages for: (i) the tort of civil malicious prosecution — for maliciously bringing bankruptcy proceedings against the plaintiff; (ii) negligence; and (iii) abuse of process of court.

FINDINGS OF THE HIGH COURT

[3] In essence, the key grounds of the learned judge are as follows:

(a) the plaintiff cannot sue for civil malicious prosecution because there must be a criminal prosecution first (*Rawther v Abdul Kareem* [1966] 2 MLJ 201 (FC); *Jaafar bin Mohd Khalid v Hong Leong Bank Bhd* [2013] 5 MLJ 800 (CA); *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 (FC));

(b) the plaintiff cannot sue for the tort of abuse of process because there is no mala fide on the part of the defendant (*Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693 (FC)); and

(c) the plaintiff cannot sue for the tort of negligence because parties to a proceeding and their solicitors and counsel do not generally owe any duty of care to the other side (*Customs and Excise Commissioners v*

Barclays Bank plc [2006] 4 All ER 256 (HL); *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507).

SUBMISSION OF PARTIES

[4] On the first point concerning civil malicious prosecution, learned counsel for the plaintiff argued that the learned judge's reliance on *Rawther* is misplaced as the facts in that case are materially different. That case, the plaintiff had successfully sued for malicious prosecution after the plaintiff was acquitted of a charge of making a false affidavit. The Federal Court reversed the decision of the lower court on the ground that the plaintiff had failed to prove that it was the defendant who set the criminal law in motion against the plaintiff. Similarly, *Jaafar* is also distinguishable on the facts. Learned counsel relied on *Tetuan Bee Ling & Co lwn Vijendran Ponniah* [2010] 6 CLJ 643 (CA) to argue that the plaintiff's claim for civil malicious prosecution is sustainable and an actionable tort. The learned judge also failed to consider the plaintiff's averments in his affidavit and statement of claim of the acts of malice by the defendant. *Tetuan Bee Ling & Co* supports the proposition that civil malicious prosecution is a recognised cause of action. Malicious prosecution is an actionable tort and includes the prosecution of civil proceedings (*Willers v Joyce and another (No 1)* [2017] 2 All ER 327; [2016] UKSC 43).

[5] On the second and third point concerning abuse of court process and negligence, learned counsel for the plaintiff argued that the learned judge did not provide any reasons for arriving at his finding that there was no mala fide. The fact that the defendant did not appeal against the annulment order is tantamount to the defendant's admission that the bankruptcy proceedings against the plaintiff was an abuse of process and that the defendant did not have the right to commence the bankruptcy proceedings in the first place. Therefore, learned counsel argued that this is not a plain and obvious case to be dismissed summarily and the plaintiff should be given an opportunity to prove at trial that the defendant did not have a reasonable and probable cause to the ROAO against the plaintiff (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC)).

[6] In reply, learned counsel for the defendant argued that there is no such tort as 'civil malicious prosecution'. Since the plaintiff pleaded the tort of malicious prosecution and not the tort of civil malicious prosecution *Rawther*'s case applies and the plaintiff is required to satisfy the five elements viz: (i) the defendant has set a criminal law in motion against the plaintiff; (ii) the criminal proceedings against the plaintiff terminated in the plaintiff's favour; (iii) the defendant had no reasonable and probable cause for setting the law in motion against the plaintiff; (iv) the criminal proceedings was actuated with malice in that the defendant had a motive other than to only carry the law into effect; and

(v) the plaintiff must prove damages. The facts in *Jaafar*'s case are the same with the instant case. There was no criminal charge set in motion against the plaintiff.

[7] Learned counsel for the defendant also argued that the plaintiff's reliance on *Tetuan Bee Ling*'s case ia misconceived as the Court of Appeal in *Jaafar*'s case had pronounced that the causes of action preferred by the plaintiff in *Tetuan Bee Ling*'s case did not include the tort of malicious prosecution but the tort of malicious civil proceedings or malicious proceedings in bankruptcy. Further, since the bankruptcy proceedings commenced against the plaintiff in this case was based on a valid judgment and this fact is admitted by both parties, this itself makes it conclusive that the defendant had a reasonable and probable cause to lodge bankruptcy proceedings.

[8] Learned counsel also argued that *Willers v Joyce and another (No 1)* does not apply as it conflicts with the Federal Court decision in *Rawther*'s case (s 3 of the Civil Law Act 1956).

STRIKING OUT PROCESS UNDER O 18 R 19 OF THE ROC 2012

[9] Under O 18 r 19 of the ROC 2012 the court has the power to strike out the whole or part of any pleading which discloses no reasonable cause of action, or which is scandalous, frivolous or vexatious, or which may prejudice, embarrass or delay the fair trial of the action, or which is otherwise an abuse of the process of the court. The process of striking out pleadings under this rule is summary in nature.

[10] The following principles upon which the court acts in exercising its summary powers of striking out pleadings are well settled and established in the oft-cited decision of the then Supreme Court in *Bandar Builder Sdn Bhd*:

(a) the court's power of striking out pleadings is exercisable only in plain and obvious cases and where no reasonable amendment would cure the defect;

(b) the court in exercising its powers should not conduct a minute examination of the documents and facts of the case in order to ascertain whether the party has a cause of action;

(c) if the point requires substantial argument and careful consideration, it may be more appropriate to set it down for trial under O 33 r 2 of the ROC 2012;

(d) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious in the sense that it is plainly

evident that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks; and

(e) so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

DECISION

[11] The defendant's principal argument is that the tort of civil malicious prosecution is non-existent; learned counsel cited numerous authorities in support of his proposition. If the defendant's contention is correct, then this is a plain and obvious case that the pleadings discloses no reasonable cause of action, then the statement of claim must be struck out. Is the defendant's argument borne out? In order to answer this question, it is necessary to set out below a brief treatise on the tort of malicious prosecution in the context of this appeal.

TORT OF MALICIOUS PROSECUTION

[12] The tort of malicious prosecution is a common law wrong. It strikes at the balance between two countervailing interests of social importance: safeguarding the individual from being harassed by unjustified litigation and encouraging citizens to aid in law enforcement. On the one hand, it is the right of every person to put the law in motion if he does it with the honest intention of protecting his own or the public interest. Conversely, if legal proceedings are initiated against an individual for a collateral purpose or without any proper basis or foundation for believing that they will ultimately succeed, that individual may suffer great injury during the course of the proceedings. That individual who is aggrieved by legal proceedings improperly instituted against him may sue for damages for the tort of malicious prosecution.

[13] Under English law, the tort of malicious prosecution is limited to malicious institution of criminal prosecutions and is not generally available in civil proceedings. It has, however, been extended to civil claims which constitute special cases of legal process such as the malicious prosecution of a petition in bankruptcy or the malicious presentation of a winding up petition (as observed by Lord Steyn in *Gregory v Portsmouth City Council* [2000] 1 All ER 560 (HL); see also *KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation)* [2018] 4 MLJ 168; [2018] 3 AMR 285 (CA) at para [52]). Indeed, it has also been opined in *Bullen & Leake & Jacob's Precedents of Pleadings* (14th Ed, Vol 1) at para 2-06 that an action may lie for the abuse of ordinary civil process in respect of a tort of maliciously instituting civil proceedings. In most respects, the matters which must be proved and pleaded

are fundamentally the same except that the proceedings do not need to have been determined in the claimant's favour.

[14] Applying the established principles we are of the considered view that this is not a plain and obvious case for the court to exercise its power of striking out the statement of claim. In this case, the plaintiff's cause of action is predicated on the tort of maliciously instituting civil proceedings. In particular, it is pleaded in para 23 of the statement of claim that the defendant had maliciously instituted bankruptcy proceedings against the plaintiff. The circumstances leading to the making of an ROAO against the plaintiff and the annulment of the ROAO are contained in paras 3–22 of the statement of claim. We do not think that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to his claim. Whilst the cause of action may not have been appropriately framed in the statement of claim, we are not satisfied that no reasonable amendment would cure the defect.

[15] In his written judgment, the learned judge opined that the plaintiff cannot sue for the tort of abuse of process as there is no evidence to prove mala fide on the part of the defendant in taking out the bankruptcy proceedings against the plaintiff. With respect, we do not think that the learned judge ought to have conducted a minute examination of the documents and facts of the case in arriving at his finding. The established principles are quite clear that in a summary process under O 18 r 19, the court should not conduct a minute examination of the documents and facts in order to ascertain whether the plaintiff has a cause of action.

[16] At any rate, we are in agreement with the views expressed in preceding para [12] and the undisputed facts of the instant appeal fall within the special cases of legal process such as the malicious prosecution of a petition in bankruptcy. As such, we are of the considered view that on the facts, the summary process of striking out the pleadings is not suitable and the matter should proceed to full trial to be decided on viva voce and documentary evidence.

[17] In consequence thereof, we allowed the appeal with costs in the cause and remitted the matter to the High Court for full trial.

Appeal allowed with costs and matter remitted to High Court for full trial.

Reported by Nabilah Syahida Abdullah Salleh